FEDERAL MARITIME COMMISSION

DOCKET NO. 06-08

IN THE MATTER OF THE LAWFULNESS OF UNLICENSED PERSONS ACTING AS AGENTS FOR LICENSED OCEAN TRANSPORTATION INTERMEDIARIES

COMMENTS OF THE NATIONAL CUSTOMS BROKERS AND FORWARDERS ASSOCIATION OF AMERICA, INC.

On August 11, 2006, the Commission issued a notice that a licensed Ocean Transportation Intermediary ("OTI"), Team Ocean Services, Inc. ("TOS"), filed a petition seeking the issuance of a declaratory order ("Petition") affirming that OTIs could lawfully engage unlicensed persons to act as their agents, as long as the arrangements met three requirements: 1) they were based on "express authority from the OTI contained in a [presumably written] contract"; 2) "the contract clearly binds the agent to conduct business on behalf of the OTI principal within the parameters set forth in the contract;" and 3) "the arrangement provides that the agent will remain under the control of the OTI principal in performing those activities."

In its Notice, the Commission invited interested persons to reply. The following constitutes the comments of the National Customs Brokers and Forwarders Association of America, Inc. ("NCBFAA" or "Association").

I. THE NCBFAA HAS A CLEAR INTEREST IN THE ISSUES IN THIS PROCEEDING

The NCBFAA, together with its 31 regional affiliated associations, is the national spokesperson for, as relevant here, the nation's OTIs, which consist of both ocean freight forwarders and non-vessel operating common carriers ("NVOCCs"). As such, the

operational arrangements and regulations that affect the businesses of OTIs are of direct interest to the Association and its members. The NCBFAA accordingly requests that the FMC consider the following comments when issuing a decision in this matter.

As a prefatory statement, however, the NCBFAA wants to make it clear that it has no knowledge concerning the nature of the enforcement proceeding that was initiated against TOS and is expressing no position as to whether the conduct which formed the basis of that proceeding has any relevance to the Petition that TOS filed. The NCBFAA is instead specifically restricting its comments to the legal issues raised by the Petition.

As expressed in more detail below, the NCBFAA generally supports the position espoused by TOS concerning the propriety of NVOCCs and ocean forwarders being able to work with agents that are not themselves separately licensed by the Commission as OTIs. On the other hand, the Association believes that the Petition inappropriately opines that existing law and regulations (1) would permit both NVOCCs and forwarders to have the same types of agency relationships or (2) that there is any prescribed form or requirements that must exist in order to have lawful, bona fide agency relationships.

II. NVOCCS NECESSARILY DEPEND UPON THE USE OF AGENTS IN FULFILLING THEIR RESPONSIBILITIES TO THEIR CUSTOMERS

A useful starting point in considering the permissible range of activities of NVOCCs requires a reference to the provisions of the Shipping Act. Under Section 3 (6), 46 App. U.S.C. §1702(6)), a "common carrier" is defined as:

> A person holding itself out to the general public to provide transportation by water of passengers or cargo between the United States and a foreign country for compensation that – (A)ssumes responsibility for the transportation from the port or point of receipt to port or point of destination . . . .

And, an NVOCC is defined as:

> . . . a common carrier that does not operate the vessels by which the ocean transportation is provided, and is a shipper in its relationship with an ocean common carrier. (Section 3(17)(B), 46 App. U.S.C. §1702(17)(B)).

Consequently, the Shipping Act's definition of an NVOCC is limited to "a person holding itself out" to provide transportation consistent with the scope of its undertaking to its shippers.

In performing those services, NVOCCs necessarily rely on the services of many third parties, some of whom may be affiliated companies and some of whom may not be. For example, on traffic originated by an NVOCC operating out of an office in the United States, it may engage the services of trucking companies, packing services, consolidators, warehouses, steamship lines, breakbulk companies, and a company to receive the cargo at the overseas point of arrival and forward it on to the ultimate consignee on traffic moving from points in the United States to points abroad. Under that scenario, the only entity holding itself out to be a common carrier or NVOCC is the company in the United States. That company clearly falls within the NVOCC definition under the Shipping Act and must be licensed, tariffed and bonded in accordance with the Commission's regulations. On the other hand, the other components in the complex logistical and transportation chain described above are not holding themselves out to be common carriers, but are instead acting exclusively in this scenario as agents of the NVOCC. Accordingly, as they are not common carriers, the licensing requirements of section 19(a) of the Shipping Act, 46 App. U.S.C. §1718(a), are not applicable to their activities – as long as they are in fact acting in a bona fide agency relationship with their NVOCC principal.

Similarly, on import traffic into the United States, the same scenario takes place, only in reverse. In other words, an overseas agent of the U.S.-domiciled NVOCC issues its principal's bill of lading in order to arrange for the transportation of cargo from some overseas origin point to a destination point in the United States. It then initiates the arrangements necessary to involve one or more of the myriad types of contractors mentioned above that are used in effecting the efficient, through movement of cargo to final destination. Again, since the cargo is moving under the principal's bill of lading, the only party holding out or otherwise assuming responsibility to the shipper for the transportation is the licensed, tariffed and bonded NVOCC that is domiciled in the U.S.

Simply stated, NVOCCs cannot function without agents by virtue of the services they hold themselves out to provide.

III. NEITHER THE SHIPPING ACT NOR THE OTI REGULATIONS REQUIRE LICENSED NVOCCS TO USE LICENSED AGENTS

At the outset, it is clear that there is no requirement in the Shipping Act stating or suggesting that licensed NVOCCs must use only licensed agents in order to perform the services they hold themselves out to provide. Nor did the Commission seriously contemplate imposing such a requirement in the post-Ocean Shipping Reform Act ("OSRA") rulemaking proceeding that implemented the NVOCC licensing and bonding requirements.

While the Commission's regulations do require that agents of foreign-based unlicensed NVOCCs and separately incorporated branch offices of licensed NVOCCs are required to be licensed (49 C.F.R. §515.3), the Commission's regulations have clearly not extended licensing requirements to unaffiliated companies operating as agents for U.S.-based licensed NVOCCs. Indeed, the only discussion of which the NCBFAA is aware on

this topic is found in Docket No. 98-28, *Licensing, Financial Responsibility Requirements, and General Duties for Ocean Transportation Intermediaries*, where, in a document entitled "Confirmation of Interim Final Rule and Correction" (served April 26, 1999), the Commission stated (on page 3):

> Similarly, a licensed OTI is allowed to use an agent, say for sales work on behalf of the licensed principal, and the agent is not required to obtain its own license and financial responsibility, so long as the agent is not, in actuality, operating as a branch office of the licensee, whether unincorporated or separately incorporated.

In reviewing this language, it appears that the distinction the Commission was addressing was whether certain entities were bona fide agents or branch offices, as opposed to the types of agents that needed to be licensed and those who did not.

In promulgating the final NVOCC rules, the Commission specifically stated that it did not believe it was creating any restrictions that would:

> ... adversely affect NVOCCs from entering arrangements with those unlicensed persons providing trucking services and the like. ...

(Docket No. 98-28, Final Rule and Interim Final Rule, at 19.) Parenthetically, the phrase "the like" refers back to the previous page of the decision, in which "warehouses, truckers, consolidators, container lessors, and others who are unlicensed but necessary to an NVOCC's operations" are discussed. But the context of the Commission's statement makes it clear that the prohibition against entering arrangements with unlicensed entities in the proposed regulations applied only to ocean freight forwarders, not NVOCCs.[1]

[1] In fact, the Commission rejected a proposal that would have prohibited NVOCCs from entering into arrangements with unlicensed entities "in which any fee, compensation or other benefit" would be conferred on the unlicensed company. Concluding that this issue was intended to address the issue of compensation and fee sharing by freight forwarders, the Commission ruled that it was not relevant to NVOCCs. (*Id.*)

As noted above, the categories of agents that the Commission specifically discussed as not needing to be separately licensed include entities that:

a. act as sales agents;

b. provide warehousing services;

c. provide trucking services;

d. provide consolidation services

e. provide container leasing services

f. process bills of lading; and

g. provide services "necessary to an NVOCC's operations."

This list is not exclusive, however, as the Commission recognized that there are many different types of agents that might be involved and accordingly qualified the discussion of their services with phrases such as "save for," "and the like," and "such as." Moreover, in promulgating its definition of what constituted legitimate NVOCC services, the Commission declared that such services may include "entering into arrangements with origin or destination agents," 46 C.F.R. §515.2(l), but did not indicate that those agents needed to have their own separate licenses.

That the Commission declined to seek to regulate in the area of NVOCC agency relationships is not surprising in view of the nature of services that common carriers provide to their customers under their contracts of transportation. Just as is the case with ocean common carriers, NVOCCs necessarily rely upon third parties to perform many of the services that are required in order to move cargo from origin to destination. Yet, the NCBFAA is not aware of any suggestion that the agents of ocean common carriers, such as stevedores, warehouses, consolidators, breakbulk terminals, container leasing services, etc., all of whom provide services necessary to the operations of the various steamship

lines, should necessarily be licensed simply because they are performing services required under the ocean common carrier's contract of carriage with its shippers. From the shipper's perspective, the issue of whether the various services performed by the principal or some agent is irrelevant, since it has contracted with the principal and is able to hold that party responsible for complete performance.

The NCBFAA recognizes that there is a footnote in a Commission decision which raises the question as to whether all of the agents performing the functions described above must be licensed. In that regard, footnote number 43 in *Rose Int'l, Inc. v. Overseas Moving Network Int'l, Ltd.*, 29 S.R.R. 119, 168 states:

> . . . Section 19 of the Shipping Act now requires all persons in the United States offering Ocean Transportation Intermediary ("OTI") services, including those persons operating as agents, to be licensed. *See also* 46 C.F.R. §515.3.

While this sentence might be read broadly as supporting the notion that NVOCC agents must be licensed, that cannot be correct as a blanket statement of law. Instead, the licensing requirement only comes into play when it is the agent, not the principal, that is holding out to provide the NVOCC services in its own name, rather than in the name of its principal. In that instance, and in that instance alone, would the agent need to be licensed, because it is only then that it is "offering" common carrier services to the public and thus subject to the requirements of Section 19 of the Act. Hence, the cited sentence cannot properly be read as broadly as its text might suggest.

Moreover, any attempt to extend licensing obligations to NVOCC agents would necessarily have to resolve the question of which agents need to be licensed. Are warehouses, trucking companies, consolidators, container leasing services or sales agents required to be licensed? Even assuming there was some valid public policy favoring the

licensing of receiving agents (and the Association is not aware that this is the case), it is not clear how that could realistically be accomplished. For example, if a company provides only destination services, such as receiving cargo from the vessel operator and having it delivered to the ultimate destination, it is not clear how that entity could qualify for a license since its personnel would be unlikely to have the requisite experience required of Qualified Individuals under 46 C.F.R. §515.11. And, since NVOCCs, as is the case with ocean common carriers, use a large number of agents, many of whom are being changed constantly in view of the unique and diverse requirements of their contracts of carriage, the licensing process would inundate both the NVOCCs and the Commission and bring commerce to a virtual halt while applications for licenses are being processed.

As the NCBFAA understands it, there are two reasons why there may be some sentiment in support of the licensing of NVOCC agents. First, the requirements that NVOCC agents be licensed might have the effect of limiting certain malpractices that occur from time to time in the NVOCC industry, such as the misuse of a party's service contracts. Second, unlike the situation with branch offices, an NVOCC principal is not required to establish an additional $10,000 increment in its surety bond relating to the activities of its agents; hence, there might be a concern about the dollar amount of certain bonds.

With respect to malpractices, the NCBFAA recognizes that the Commission has properly made it a priority to monitor NVOCC compliance with the Shipping Act and the Agency's regulations. While the NCBFAA supports that goal, it does not believe that the licensing of agents would have much, if any, salutary affect on that mission. To the

extent unlicensed NVOCCs are entering into service contracts with vessel operators, the regulations already prohibit this conduct and require that the contracting steamship line verify the bona fides of illicit parties. (46 C.F.R. §530.6.)

The misuse of service contracts by NVOCCs, whether licensed or not, is a significant matter, but this malpractice has no necessary relationship to the agency issue. The Association is not aware that there is any impropriety if an overseas agent of a U.S. licensed NVOCC enters into contracts of carriage with its shippers and issues bills of lading in the name of its principal in order to facilitate the movement of cargo from foreign points into the United States. When it does so, the agent is clearly acting in the name of its principal, is required to charge shippers in accordance with the principal's tariffs or NVOCC Service Arrangements, and is entitled to purchase services from the underlying vessel operators utilizing any service contracts its principal may have. Issuing a license to the overseas agent will not affect its relationship with its principal, the shippers, or the responsibilities of the principal and agent under the Shipping Act. That is also the case if the agent of the licensed NVOCC is functioning in the United States, rather than abroad. The use of agents accordingly does not, in and of itself, affect the propriety or legality of any course of conduct.

With respect to the issue of bonds, the Commission's regulations clearly provide for an increased $10,000 bond increment only in the event that company has unincorporated branch offices. While the Commission might have the authority to extend this requirement to include unrelated, non-affiliated entities that are acting as agents of NVOCCs, this would create some of the same problems discussed above relating to the possible licensing of agents. Would overseas agents need to included in determining

bond amounts? Which types of agents would have to be bonded? How would NVOCCs, the Commission and surety companies be able to keep pace with the rapidly changing roster of agents that are used by NVOCCs? If NVOCC agents need to be bonded for some reason, why would that not also be true of the agents of the vessel operators?

Aside from the fact that the NCBFAA is not aware of any public policy in support of such an expansive set of regulations[2], an attempt of this nature would open a veritable Pandora's Box of administrative, operational and financial nightmares for the entire industry. It seems clear that the cost and administrative burden of licensing and/or bonding agents would be staggering on both NVOCCs (most of whom the Commission has already found to be small businesses)(Docket No. 98-28, Notice of Proposed Rulemaking, at 8) and the government itself. Yet, there being no significant countervailing benefit to the shipping public (other than to make modest increases in surety bond amounts), there is no apparent justification for such a requirement.

Finally, although the Commission has long been well aware of the fact that NVOCCs (and ocean common carriers) rely heavily upon the use of agents in providing services to the public, the only specific requirement of this nature that was imposed subsequent to the enactment of OSRA relates to the use of agents in the United States by non-licensed foreign-based NVOCCs. In determining not to require that foreign-based NVOCCs be licensed, the Commission concluded that such entities could lawfully provide services in the U.S. trades only if they used an independently licensed agent in the United States. (Docket No. 98-28, Final Rule and Interim Final Rule, at 4; 46 C.F.R.

[2] In promulgating any rule of this nature, the Commission would of course be required to conduct a Regulatory Flexibility Analysis. Unless any proposed rule was narrowly drawn, the Commission would not likely be able to certify that the proposal had little financial impact on the trade or government.

§515.3.)[3] That the Commission elected to require the use of a licensed agent in this instance, and this instance only, demonstrates that the Commission was aware that the need to have agents licensed was restricted to those situations where the NVOCC principal itself was outside the reach of the agency's oversight processes. That need does not exist in situations where the principal is in fact licensed.

IV. AGENCY AGREEMENTS NEED NOT BE IN WRITING

In its Petition, TOS appears to imply that agency agreements necessarily be in writing. While not specifically stating that contracts should be in writing, TOS adds that any agency agreement be "based on express authority from the OTI contained in a contract." (Petition at 7.) The NCBFAA believes, to the contrary, that any such requirement is unnecessary as a matter of law or policy.

In the first place, it is clear that agency relationships can be established in a number of ways, either by express written agreements or by a course of conduct. Restatement of the Law of Agency, 2d, §26; *Houston Exploration v. Halliburton Energy, Inc.*, 359 F.3d 777, 780 (5th Cir. 2004). Moreover, an agent can bind its principal if it has the actual or apparent authority to do so. *Opp v. Wheaton Van Lines, Inc.*, 231 F.3d 1060, 1064-65 (7th Cir. 2000). All that is required is that the principal authorize the second party to act on its behalf subject to its control, and the second party consents to do so. *Judah v. Reiner*, 744 A.2d 1037 (D.C. App. 2000). Consequently, as long as the agent is appropriately authorized by its principal, it can properly act on the principal's behalf and bind the principal with respect to any actions that third parties have reason to believe

[3] The Commission also did establish a requirement that foreign-based NVOCCs appoint a "legal agent [in the United States] for the receipt of judicial and administrative process, including subpoenas." (46 C.F.R. §515.24(a).)

come within the scope of that agency. Indeed, the Commission's regulations recognize this fact, as 46 C.F.R. §515.4(b)(2) specifically notes that OTIs:

> will be held strictly responsible for the acts or omissions of any of its employees or agents rendered in connection with the conduct of its business.

But the regulations do not require that there be a written contract between the principal and agent.

This is not to say that it may not be prudent for NVOCCs to have written agreements with certain of their agents. To the contrary, in many types of agency relationships, it would imprudent for companies not to have written agreements that memorialize their respective responsibilities and indemnity obligations in the event, for example, there is loss or damage to cargo or one of the parties in the arrangement has acted improperly or negligently. But this is a matter for the parties, not the government, to decide. And, the principal will be bound by the actions of its agents whether or not the agreements are memorialized in writing.

In many instances, as is the case with the licensing and bonding issues discussed above, it would be impossible, not just impractical, for NVOCCs to enter into written agreements with all of their various agents. The identities of many of these parties are changing constantly, so that there would not be time – even if there was a reason to do so – to enter into written agreements with the various consolidators, receiving agents, truckers, warehouses, etc. that are used in order to carry out the principal's responsibilities under the contracts of carriage with its shippers.

Similarly, given the virtual infinite types and numbers of agents, it would be difficult for the Commission to establish clear guidelines governing the content of those agreements. This is a thicket into which the FMC should not attempt to wander. Again,

it is sufficient both for regulatory and operational reasons that the principal and its agents be able to demonstrate that an agency relationship exists and the Commission should not attempt to establish any specific requirements in this area.

V. THE SUGGESTION THAT FORWARDERS HAVE SIMILAR AGENCY ARRANGEMENTS IS INAPPROPRIATE.

The TOS petition also suggests that both NVOCCs and ocean freight forwarders to should be free to have comparable, wide-open agency relationships with third parties. Unlike the situation with NVOCCs, however, there is no uncertainty in the law relating to ocean freight forwarders and agents. To the contrary, the Commission's existing regulations make it quite clear that ocean freight forwarders are permitted only to have agency relationships with bona fide sales agents (46 C.F.R. §515.32(b)).

The distinction is appropriate, as ocean freight forwarders are fundamentally different than NVOCCs. Ocean freight forwarders do not hold themselves out as carriers or enter into contracts of transportation with shippers, but instead act as the shippers' agent in booking cargo and providing various related services relating to the export of shipments. Simply stated, forwarders do not act as common carriers, do not hold themselves out as such, and are not responsible for providing the various services that are required to complete any contracts of transportation. Moreover, unlike NVOCCs, forwarders do not need to rely upon the activities of third party contractors and agents overseas or even in the United States; instead, ocean freight forwarders can function properly and effectively through their individual and affiliated branch offices.

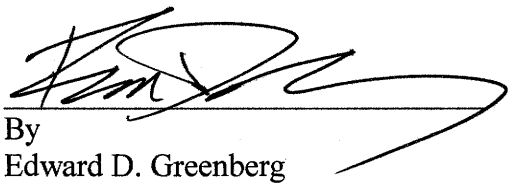
The NCBFAA believes that the current regulations pertaining to ocean freight forwarders are appropriate and that there is no need to broaden the regulations pertaining to the types of arrangements that forwarders may have with unlicensed persons.

Accordingly, the Association suggests that the Commission not agree in this proceeding that ocean freight forwarders be able to enter into additional types of agency agreements with unlicensed persons under the existing regulations.

VI. CONCLUSION

Accordingly, the NCBFAA supports the portion of the TOS petition that seeks a confirmation that NVOCCs are permitted, under the existing statute and regulations, to have agency agreements with unlicensed agents, but urges the Commission to avoid establishing any requirements pertaining to the content or form of those agreements. In addition, the NCBFAA believes that the second TOS request, concerning ocean freight forwarders and agency agreements, should be denied.

Respectfully submitted,



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